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In the Supreme Court of the United States

OCTOBER TERM, 1931

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, PETITIONER

v.

NORTH GERMAN LLOYD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of Philip Elting, Collector of Customs of the Port of New York, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above case on January 18, 1932, and reported in 54 F. (2d) 997, affirming a judgment of the United States District Court for the Southern District of New York in favor of respondent, the plaintiff below. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a fine paid by the respondent pursuant to Section 6 of the Quota Act, as amended, for bringing to the United States an alien not admissible under the terms of that Act should be refunded, when the Secretary of Labor has not been satisfied that such inadmissibility "was not known to, and could not have been ascertained by the exercise of reasonable diligence by" the respondent.

2. Whether this discretionary power as to the refund of such a fine, vested by the Quota Act in the Secretary of Labor, was properly exercised by the United States District Court where the latter, contrary to the view of the Secretary, was satisfied that the respondent could not have ascertained the inadmissibility of the alien by the exercise of reasonable diligence.

3. Whether the respondent exercised such reasonable diligence by relying, with no independent inquiry, upon the alien's claim that he was to be a temporary visitor for business purposes and upon his American consular visa issued in January, 1924, and endorsed "purpose to proceed to the U. S. on business only within the meaning of section 2 of the Restrictive Immigration Law."

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix, *infra,* pp. 9–12.

STATEMENT

On February 14, 1924, respondent brought to the United States on its steamship "Bremen" the German alien Joseph Funk. He was in possession of a non-quota passport visa issued to him on January 24, 1924, by the American Consul at Munich bearing the notation "purpose to proceed to the U. S. on business only within the meaning of Section 2 of the Restrictive Immigration Law." Both the visa and the stipulation were obtained by fraudulent statements of the immigrant. (R. 29.) The respondent made no inquiry as to the real purpose of the alien's emigration and the truth of his representations abroad. (R. 41.)

On arrival, he was detained by the immigration officials at Ellis Island, and after a hearing by a Board of Special Inquiry was excluded and deported on the ground that he was a quota immigrant and that the quota applicable to his nationality had been exhausted. The reasons for this action appear to have been that the alien arrived without money or a return ticket; his passage had been paid by relatives in this country; he claimed that he was coming here to collect an inheritance of $400, but had no documentary evidence to support this claim; and he stated that there was no reason why he could not remain permanently in this country. (R. 17.)

Respondent was notified that by bringing in a quota immigrant in excess of the quota allowance in violation of the Quota Act of May 19, 1921, as

amended May 11, 1922, it had incurred liability to a fine of $200, plus $110 paid by the alien for passage, and that it would be allowed sixty days in which to be heard. Respondent protested against the proposed fine and thereafter was notified that fine had been imposed. It was paid under protest.

Judgment was entered by the District Court on March 2, 1931, in favor of the respondent, on motion for summary judgment, in an amount of $423.15 and costs taxed at $20 (R. 33), and certificate of probable cause under R. S. 989 (U. S. C., Title 28, sec. 42) was signed on March 3, 1931 (R. 34).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In affirming judgment in favor of respondent.
2. In holding that the consular visa justified respondent in bringing the alien to this country without investigation as to his true status, and that the fine was illegally imposed.
3. In failing to hold that the refusal of the Secretary of Labor to remit the fine was conclusive; and that the fine was legally imposed.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals has erroneously construed an important Federal statute. The Quota Act (42 Stat. 5) as amended May 11, 1922 (42 Stat.

540), provided in Section 6 that a fine, collected under that statute for bringing to the United States an inadmissible alien, "shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by" the person bringing in the alien.

In the instant case respondent brought an alien to the United States. There is no evidence that any investigation was made by the respondent as to his admissibility. The alien claimed to be visiting the United States temporarily on business, but could not establish this claim, and was excluded. His inadmissibility under the Act is conceded. The fine was collected from the respondent pursuant to the provisions of the Quota Act, and although the Secretary of Labor was repeatedly appealed to, he refused to remit the fine.

Under these circumstances, we submit, the court below erred in allowing recovery. It is clear that this fine was legally collected, for the alien was inadmissible and the respondent brought him to the United States. The alien secured a non-quota visa from the United States Consul and the respondent apparently transported him in reliance upon the visa. But this it had no right to do. *United States ex rel. Spinosa v. Curran,* 4 F. (2d) 613 (E.D.N.Y.), affirmed, 4 F. (2d) 614 (C. C. A. 2d). The consular instructions, *infra,* p. 11, direct the issuance of such a visa regardless of the Consul's

opinion as to the admissibility of the alien. The alien's claims that he was exempt from the quota were in fact fraudulent and upon inquiry regarding his means of returning from his "visit" to the United States, would have been disclosed to be without foundation. Whether or not the steamship company made a proper effort to ascertain his admissibility prior to transporting him was a question solely for the determination of the Secretary of Labor. See *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320. The case was submitted to the District Court on affidavits of the evidence considered by the Secretary in denying the remission of the fine. There was no conflict in the testimony presented to the court. The Quota Act gave the District Court no authority to review the decision of that officer, since there was evidence to support his decision.

This was recognized by the Circuit Court of Appeals for the Second Circuit in the recent case of *Lloyd Sabaudo Societa Anonima per Azioni* v. *Elting,* decided February 1, 1932, not yet reported, where the court stated:

> Determination of the fact of foreign detectability of an excluding condition has been left to what will satisfy the Secretary of Labor in that regard. This means that whatever the Secretary of Labor decides, provided his decision is neither arbitrary nor capricious, is final.

2. The decision of the Circuit Court of Appeals in the instant case is in conflict with other decisions

in that circuit. Conflict with *North German Lloyd* v. *Elting,* 48 F. (2d) 547 (C. C. A. 2d), is sharply emphasized by the dissenting opinion of Judge L. Hand, who states that in that case "the facts were in my opinion indistinguishable from those at bar." There a suit for recovery of a similar fine for bringing in an alien inadmissible because of a physical defect was dismissed because the Secretary refused to exercise his discretion by refunding the fine. The most recent decision of the Circuit Court of Appeals in an immigration fine case is similar. In *Lloyd Sabaudo Societa Anonima per Azioni* v. *Elting, supra,* the decision of the District Judge, reported in 45 F. (2d) 405, 410, upholding fines imposed for bringing into the United States certain aliens inadmissible because of physical defects, was affirmed on this point. It is difficult to reconcile the opinion in the instant case with these other decisions of the same court. This conflict of opinion is reflected in the decisions of the District Courts. *Lamport & Holt* v. *Elting,* 51 F. (2d) 1057 (S. D. N. Y.).

3. The questions presented by this petition are important and should be settled. There is much litigation for recovery of these fines. In the District Court for the Southern District of New York there are approximately 2,000 causes of action of this character pending, and 555 of them involve the general question in the instant case. There are many presenting the precise issue here. The present unsettled state of the law with re-

gard to such cases causes hardship to transportation companies, and presents grave difficulties to the Government officers charged with the administration of the immigration laws. A review by this Court of the questions presented in this petition will go far toward settling the law and will materially relieve the burden of litigation in the lower Federal courts.

CONCLUSION

Wherefore it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

APRIL, 1932.

APPENDIX

STATUTES AND REGULATIONS

The Quota Act of May 19, 1921, c. 8, 42 Stat. 5, provided in part:

* * * * *

SEC. 2. (a) That the number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910. This provision shall not apply to the following, and they shall not be counted in reckoning any of the percentage limits providing in this Act: * * * (4) aliens visiting the United States as tourists or temporarily for business or pleasure;

* * * * *

(d) When the maximum number of aliens of any nationality who may be admitted in any fiscal year under this Act shall have been admitted all other aliens of such nationality, except as otherwise provided in this Act, who may apply for admission during the same fiscal year shall be excluded:

* * * * *

The Act of May 11, 1922, c. 187, 42 Stat. 540, amended the Quota Act by adding the following provision:

SEC. 6. That it shall be unlawful for any person, including any transportation company other than railway lines entering the

United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the United States either from a foreign country or any insular possession of the United States any alien not admissible under the terms of this Act or regulations made thereunder, and if it appears to the satisfaction of the Secretary of Labor that any alien has been so brought, such person or transportation company, or the master, agent, owner, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $200 for each alien so brought, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. No vessel shall be granted clearance papers pending the determination of the liability to the payment of such fine, or while the fine remains unpaid; except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine. Such fine shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such person, or the owner, master, agent, or consignee of the vessel, prior to the departure of the vessel from the last seaport in a foreign country or insular possession of the United States.

The Immigration Rules of 1924 provided in part:

> Rule 9, subdivision E.—Aliens visiting the United States as tourists or temporarily for business or pleasure for a period not to exceed six months shall not be subject to the provisions of section 2 (a) of said Act of May, 1921, as amended, nor shall they be counted in reckoning any of the percentage limitations provided in said act.

General Instruction, Consular, No. 839, issued by the Secretary of State on July 14, 1922, and in effect until June 12, 1924, provided in part:

> SECTION 12. * * *—In the work of alien visa control it is the desire of the Department that consular officers shall be of the greatest possible assistance to the Bureau of Immigration, Department of Labor. Consular officers are, however, not authorized to assume abroad the functions vested by law in the immigration officers of the United States of deciding upon the admissibility of aliens after arrival at an American port.
>
> Nevertheless, in order to prevent or avoid so far as possible hardships and dangers involved in deportation under present conditions, the consular officer to whom a passport is presented for visa shall endeavor to ascertain as far as practicable whether the holder is a member of any of the classes excluded from the United States by the provisions of section 3 of the immigration act of February 5, 1917. If an alien, after submitting to a consular officer the alien's declaration on Form 228, appears in the consul's judgment to fall clearly under one of the classes liable to exclusion, the consul shall so advise the alien, informing him of the serious risk he is taking in attempting

to enter the United States and acquainting him with the probability that he will be excluded from the United States and deported. If the alien nevertheless insists upon proceeding, the consular officer shall visa his passport if it is valid, and if there is no other reason for refusal.

* * * * *

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